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No. 582 October Term, 1923

FILED
OCT 6 1923
WM. R. STANSBURY

IN THE

Supreme Court of the United States

EPHRAIM LEDERER, Collector of Internal Revenue of the First District of the State of Pennsylvania,

Petitioner

v.

FIDELITY TRUST COMPANY,

Respondent

Answer of Fidelity Trust Company to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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for Respondent

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EPHRAIM LEDERER,
Collector of Internal Revenue of the First District of the State of Pennsylvania, Petitioner,

vs.

FIDELITY TRUST COMPANY, Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:—

The answer of Fidelity Trust Company respectfully shows:

FIRST. The Judicial Code provides that the decision of the Circuit Court of Appeals in Revenue cases shall be final, subject, however, to review by the Supreme Court of the United States

on certiorari; but under the settled rule of this court as stated in Forsythe vs. Hammond, 166 U. S. 506, the writ of certiorari will only be granted when the circumstances of the case are such that "the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interest of this nation in its international or external relation," demands the exercise of the power to issue such writs.

This is not such a case as is contemplated by the rule so announced.

The tax here in question was imposed under the Revenue Act of 1918, Sub-division 1, Schedule A, Title XI, Stamp Taxes, which reads:—

> "I. Bonds of Indebtedness: On all bonds, debentures or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form known generally as corporate securities, on each one hundred dollars of face value or fraction thereof five cents: Provided, That every renewal of the foregoing shall be taxed

as a new issue: Provided further, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured."

The Section of the Act under which the tax is sought to be imposed is entitled "Bonds of Indebtedness." It taxes instruments which are recognized evidences of indebtedness when issued by an individual, and as to corporate indebtedness it uses the words "all instruments, however termed, issued by any corporation with interest coupons or in registered form known generally as corporate securities."

As a matter of grammatical construction and of common sense reading of the words of the statute, to what can the words "corporate securities" relate other than to "instruments issued by any corporation with interest coupons or in registered form"? This more clearly appears if we transpose the two qualifying parenthetical sentences, thus, "and all instruments issued by any corporation with interest coupons or in registered form, however termed, known generally as corporate securities."

The words of the statute are definite, precise, grammatically expressed and free from ambiguity. The tax is imposed on "all instruments (however termed) issued by any corporation (with interest coupons or in registered form) known generally as corporate securities."

The instrument sought to be taxed is not a certificate of indebtedness or a corporate security. It is not the obligation of a corporation to pay money owing by it, nor does it evidence an indebtedness secured on the property of a corporation. It is a mere declaration of trust and defines the holder's ownership of the equipment leased to the railroad company and the extent of his interest in the moneys to be received as rental therefor. Neither the railroad company nor the trust company is indebted to the certificate holders. The railroad company is obligated to pay rental for the use of certain equipment, and the trustee, to which such rental is paid, has to turn over to each certificate holder his proportionate share when and as received.

The certificate is merely the evidence of the holder's equitable ownership of an undivided interest in the equipment leased to the railroad

company and the rentals payable therefor. How, then, can such muniments of title be termed "corporate securities"?

Interest is an attribute of a debt. The dividend warrants attached to the equipment certificates are not interest coupons and do not purport to be such.

The reference in this clause of the Act to renewals is also instructive. There can be no renewal of a contract for the conditional sale of a chattel. Either the railroad company becomes the owner of the cars, or the owners repossess themselves of their property. If a new arrangement is made, a new conditional sale contract would have to be entered into.

The last provision of this Section also shows that the instruments to be taxed are those which evidence a debt and provide for its payment.

On page 6 of the brief in support of the petition, the Government quotes an extract from the opinion of his Honor Judge Dickinson in the determination of the instant case in the District Court, which seems to call for comment on the part of the respondent.

The learned Judge before whom the case was

tried calls attention at the outset of his opinion to the fact that the question for decision is the same as was ruled by him in refusing judgment for want of a sufficient affidavit of defense, and that he felt bound to follow the opinion then filed as the law of the case; but desired to add thereto some additional observations. We shall, therefore, treat the two opinions as one, the second being merely a continuation of the first. In the first opinion (Record 47) he said:

> **"The certificate is not within the literal verbiage of the Act of Congress, not being 'a certificate of indebtedness issued by any person' nor 'an instrument issued by any corporation.'** If the taxing hand has been laid only upon these specific forms of what are generally known as securities it must be withdrawn from the 'trust certificates' now under view. This would mean that they are the exceptions among the general class of securities and are exempt because the very effort made in the framing of the law to include all forms of securities of this general character has, in verbal nicety, excluded them."

This confirms our contention that these certificates were not "issued" by the Fidelity Trust Company within the meaning of that word as used in the statute. So far as the Fidelity Trust Company is concerned, they are merely certificates of ownership, without any corporate obligation to do more than collect and distribute to the owners (of whom the holder of the certificate is one) the rentals of certain rolling stock leased by their agent. There would be no difference whatsoever in the form of the certificate or in its legal effect if there were an individual trustee instead of a corporate trustee. The opinion then, however, continues as follows (Record 47):

> "The Act of Congress, however, includes more than the two kinds of securities mentioned because we think it includes everything known generally as corporate securities";

but the writer frankly adds (Record 48):

> "There are two obstacles to be surmounted before reaching this construction. One is that the rule of the nearest antecedent makes the quoted phrase relate to and serve as a definition of the described kinds of 'instru-

> ments issued by corporations,' and the other is that the finding of a meaning to tax all instruments 'commonly known as corporate securities' involves the presence of a grammatical error in the Act of Congress."

Without attempting to meet these objections he contents himself with saying (Record 48):

> "Neither of these obstacles are however insurmountable, if this was the meaning of Congress, and we so find."

It is thus entirely clear that the learned Judge did not and could not find that the statute **in words** imposed a tax on the certificates here in question. Convinced, however, that Congress intended to tax them, he sought to demonstrate that if not taxed in specific form they are, when analyzed, in effect in the same class as those so taxed. This is evident from the concluding passage of his first opinion, where he says (Record 48):

> "The real truth back of the whole discussion is that if these certificates are not taxable, it is because of the accidental circumstance of a wholly nominal separation of the security held by the taxpayer from the

obligation of debt entered into by the carrier corporation. The real security is the promise not of one corporation but of two to pay to the certificate holders the sums due them. The real transaction is the request of the carrier company made to the certificate holders to advance the money required for payment, in consideration of which the carrier agrees to pay back the sum advanced, with interest. **This it is true was not the form of the promise,** but such it was in substance because it was a promise to pay a sum which was the exact (and not accidental but prefixed) equivalent of the advances, with interest."

But this is directly at variance with the decision in United States v. Isham, 84 U. S. 496, that the liability of an instrument to stamp duty is determined by the form and face of the instrument.

The learned Judge himself has twice said that these certificates are not within the literal wording of the Act of Congress, and the law forbids extending the provisions of the Act beyond the clear import of the language used.

In his second opinion (Record 34) he says:

> "We stated before, and the experience has been repeated, that when we were listening to the argument of counsel for plaintiff, the impression produced was that these certificates had not been taxed, but when we came to read the Act of Congress we became convinced that Congress had taxed them.
>
> **"We have already found, and now repeat the finding, that as we read this Act of Congress these certificates are not among the taxable things which Congress, by the verbiage employed, has expressly named, and that the words "commonly known as corporate securities" cannot be read to refer to these certificates without ignoring the rule of reference to the nearest antecedent nor without imputing to Congress a grammatical error."**

Notwithstanding that he has thus twice found that the certificates in the case at bar are not "certificates of indebtedness" he goes outside of the document in question and proceeds to argue that they really are in effect such certificates and seemingly confuses the equipment trust certificates with the lease or bailment of the cars made by the

trustee to the railroad company. Then again, because some equipment certificates are in the form of certificates of indebtedness, and therefore within the purview of the Act, he argues that other equipment certificates which do not evidence an indebtedness must also be considered as included. In other words, he treats the act as though it had imposed a stamp tax on all equipment trust certificates and respondent were seeking to avoid the payment of the tax because these equipment trust certificates were drawn under what is known as the Philadelphia Plan. Thus he says (Record 40):

> "We adhere also to the view that these car trust certificates are taxable just as other car trust certificates are taxable, because they are in reality, although not in form, the same as the others. They are all alike car trust certificates."

He thus ignores the vital difference in form, substance and legal effect between equipment certificates evidencing an indebtedness and the equipment certificates here considered.

Twice in his opinion he unqualifiedly asserted that on the form and face of the equipment cer-

tificate it was not within the clear import of the words of the statute.

Twice in his opinion he admitted a doubt as to what the true construction was.

As pointed out in the opinion of the Circuit Court of Appeals:—

> "Car trust certificates **such as here involved,** have been so long and so largely used in the financial world and are so vital a factor in the financing and equipment of railroads, that it would seem that Congress, had it intended taxing them, would have so covered them by specific designation or by proper generic description, as to leave no question of its intent."

SECOND. It is apparent, on inspection of the form and face of the certificate, that it is not subject to stamp tax within the clear import of the words of the statute (United States vs. Isham, 84 U. S. 496), and it is respectfully submitted that the petition for certiorari should be denied.

H. GORDON McCOUCH,
for Respondent.